



**Mwangi v Kenol-Kobil Limited (Cause 587 of 2017)  
[2023] KEELRC 1866 (KLR) (3 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1866 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 587 OF 2017  
NZIOKI WA MAKAU, J  
JULY 3, 2023**

**BETWEEN**

**MARY WAMBUI MWANGI ..... CLAIMANT**

**AND**

**KENOL-KOBIL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. In the Amended Memorandum of Claim dated March 28, 2022, the Claimant prayed against the Respondent for:
  - i. Declarative orders declaring that the said termination is unlawful and lacks merit.
  - ii. Order the Respondent to pay damages to the Claimant for unfair termination of the employment as contemplated in Section 12(3)(VI) of the Industrial Court Act.
  - iii. Order the Respondent to pay the Claimant 12 months' salary on the monthly salary at the time of the dismissal as required under Section 49 of the Employment Act as compensation for unfair termination thus: 12 x 700,000/- = Kshs. 8,400,000/-.
  - iv. Order that the Respondent issue the Claimant with a certificate of service.
  - v. Order that the Respondent issues severance pay to the Claimants calculated below;  
15 days' pay x years worked  
350,000 x 25 years = Kshs. 8,750,000/-
  - vi. Order that the Respondent to issue the Claimant two months' salary in lieu of notice; 2 x 700,000/- = Kshs. 1,400,000/-.



- vii. Order the Respondent pays the Claimant her unpaid leave days One day's pay x the number of leave days;  $700,000/22 \text{ days} \times 27 \text{ days} = \text{Kshs. } 859,090/-$ .
  - viii. Order the Respondent to immediately issue the Claimant with the Logbook to her vehicle registration number KBQ 682R.
  - ix. Orders any other award or benefit that this Honourable Court may deem fit and just to grant in the circumstances of this case.
  - x. Orders the Respondent to pay Interest at courts rate on all the above prayers.
  - xi. Orders that the Respondent be condemned to pay Costs of the suit.
  - xiii. 13 days' salary worked in the month of February 2017;  $700,000/28 \text{ days} \times 13 \text{ days} = \text{Kshs. } 325,000/-$ .
2. The Claimant averred that sometime in March 1992, she participated in a competitive employee recruitment exercise initiated by the Respondent, wherein she emerged one of the best candidates. She was thus appointed as a Sales Representative in the Marketing Department in March 1992 reporting to the Commercial and Retails Sales Managers and her starting salary was Kshs. 8,000/-. She continuously acquired wide knowledge and skills that saw her get promoted to several positions within the company with salary adjustments and that her last position at the company was Special Products Manager earning a salary of Kshs. 700,000/- per month. That pursuant to this appointment, she was also appointed a member of the Group Executive Committee, a body within the Respondent Company that would deliberate on the company's policy.
  3. She further averred that after a company restructuring exercise in 2012, the office of the General Manager was scrapped off and she started reporting directly to the Group Managing Director. That she used to receive salary bonuses every end of the year as a true manifestation of the hard work she put in the Respondent company and that she was also awarded the overall employee of the year 2002 amongst the work force of more than 170 employees in Kenya. That in her last appraisal for the year July 2015 to June 2016, she was rated "Very Good" and was even given a 2% merit increase amounting to Kshs. 13,208/- and a further salary adjustment of Kshs. 26,392/-. It was the Claimant's averment that despite the foregoing achievements, the Respondent's Group Managing Director called her on Friday, February 10, 2017 at about 5.33pm informing her to go and collect a letter from the office on the following Monday. On the said Monday, she was issued with the letter dated February 10, 2017 that terminated her employment with effect from February 13, 2017, on account of "poor performance" and "restructuring" of her department.
  4. The Claimant believed that her dismissal was unfair and unlawful because she was never given any notice or warning of the alleged poor performance; had excellent or very good grades in her appraisals; was never given a valid reason for the termination; was never given a chance to be heard or defend herself on the baseless ground of underperformance; and was never issued with a certificate of service despite having worked for the Respondent for over 25 years. Further, that her dismissal was contrary to the Respondent's HR Policy which stipulates that the same has to be preceded by an inquiry into all relevant circumstances the employee might have been involved in. According to the Claimant, the real reason why she was terminated was that the Respondent was still in the process of restructuring the company, which process targeted long serving employees whom paying severance pay was considered expensive for the company. She maintains this was the reason for the Respondent to hence raise the unsubstantiated accusations of poor performance.



5. In response, the Respondent averred in its Amended Memorandum of Defence dated March 31, 2022 that the Claimant was not entitled to the orders sought in her Claim because her employment was genuinely and justifiably terminated on grounds of poor performance and that the termination was procedural and in accordance with its policy. That it noted the Claimant's poor performance on or about January 2017 when she was unable to meet her targets consistently. That despite making reasonable efforts and according to her support, she failed to improve as expected and was thus issued with a termination letter on February 10, 2017.
6. According to the Respondent, the present suit was instituted prematurely as it was in the process of tabulating the Claimant's final dues as indicated in her termination letter, including reconciling the monies she owed the company such as car loans and telephone allowance advance. It had at all times been ready and willing to pay the Claimant the balance of her terminal dues being two months' pay in lieu of notice but less the advance telephone allowance and unpaid motor vehicle insurance, with the balance totalling to Kshs. 1,357,939.51. That the Claimant is also at liberty to collect her certificate of service which has been ready for collection at the Respondent's offices. It denied that the Claimant was entitled to severance pay as her position was not declared redundant. The Respondent averred that it was not served with a demand letter notifying it of the Claimant's intention to file suit as it would have taken the opportunity to fast-track payment of the Claimant's final dues. That as such, the Claimant is not entitled to costs of this suit. Further, that the Claimant is not entitled to 13 days worked salary as the said claim is time-barred by virtue of section 90 of the *Employment Act*.
7. The Claimant's response to the Respondent's averments was that her termination was predetermined, further owing to the fact that she had prior to the termination been coerced to resign over the telephone by the group Chief Executive Officer. In addition, the Respondent took the roles of management of Liquid Petroleum Gas (LPG) from her on October 29, 2017 when it promoted another staff member to the said role. She denied owing the Respondent any monies as alleged and averred that the Respondent in fact owed her for unlawful deductions and neglect at the point of her termination. According to her, it was the Respondent that refused to acknowledge receipt of the demand letter she sent to it. She prayed for the Amended Memorandum of Defence to be struck out with costs and Judgment entered for her as prayed in the Amended Memorandum of Claim.

## **Evidence**

- 8 The Claimant testified that she had no incidence of poor performance while working at the Respondent Company. In cross-examination, she stated that her payslip was silent on the issue of the car, which they had attempted to settle the issue. The Respondent's witness Mr. David Itubia, (RW1) on the other hand, testified that he was not aware of any redundancies and confirmed on cross-examination that the Claimant was given a very good rating in her last appraisal (Claimant's Bundle page 51, para 6 and 7). RW1 also confirmed that they had not provided evidence of the Claimant's drastic deterioration in performance but could not confirm whether process was followed or not.

## **Claimant's Submissions**

- 9 The Claimant's first issue was whether the Respondent had a valid reason to terminate his employment. She submitted that under section 45 of the *Employment Act*, termination of an employee's contract of service does not pass the test of fairness unless the employer establishes by evidence that it was done on the basis of valid and fair reasons(s) and upon following a fair procedure. That in the present case, all this Court needs to ascertain is whether the reasons of poor performance and restructuring were valid grounds for dismissal. It was the Claimant's submission that the string of her consistent impeccable performance was confirmed in the last appraisal conducted on her as



conveyed by the letter dated July 8, 2016 (page 51 of the Claimant's Bundle of Documents). That no other appraisal was conducted on her after that and the Respondent had failed to provide the same if any. That as per the Respondent's own documents, the Claimant was a good performing employee as at December 2016 and having resumed work in mid-January 2017 from the Christmas Holidays, it meant that she worked for about 3 weeks before she was dismissed on alleged grounds of poor performance. That this was such a short period for the Respondent to have a paradigm shift and allege that her performance was poor to the extent of being irredeemable and with the only option of terminating her employment.

10. She submitted that whereas the law recognizes poor performance as a valid ground for termination of employment, an employer advancing poor performance must prove its existence. That in the case of Kenya Science Research International Technical and Allied Workers Union (KSRITAWU) v Stanley Kinyanjui and Magnate Ventures Ltd (Cause No. 273 of 2010) cited with authority in Lilian O. Ochang v Kenol Kobil Limited [2015] eKLR, the Court held that once poor performance of an employee is noted, the proper procedure is to point out the shortcomings to the employee and allow them reasonable time to improve. It was the Claimant's submission that poor performance was thus not a valid reason to dismiss her and that this Court ought to conclude that the said termination was unfair.
11. The Claimant further relied on a previous case filed against the Respondent with similar facts being Hellen Wambui v Kenol-Kobil Ltd [2015] eKLR wherein the Court was of the opinion that the respondent's conclusion ran against the recent history of the claimant's performance depicted in its own letters indicating consistently, very good and excellent performance by the claimant. The Court went on to find that the respondent had not demonstrated that it had a valid reason to terminate the employment of the claimant. It was the Claimant's submission that being that the said poor performance was an invalid reason for termination, the subsequent purported restructuring that ensued was equally unjustifiable.
12. The Claimant submitted that section 45 of the *Employment Act* is to the effect that failure to follow due process is a ground to justify unfair termination. That the Respondent's HR Manual at paragraph F sets out the multilevel disciplinary procedure in the Respondent Company such that the process is initiated at the supervisor level then carried forward to management level. That however in her case, there was no process whatsoever and that the Court in the case of Joseph K. Thuo v Kenol Kobil Limited [2016] eKLR similarly simply concluded that no procedure was followed. It was submitted by the Claimant that it became apparent during the hearing before this Court that the said termination was not a normal termination but a redundancy disguised as a termination. That there was a deliberate move by the Respondent to push out their long serving and high-earning employees due to the then impending sale of the Respondent Company to an entity known as Rubis Energy. She invited the Court to take judicial notice of several matters filed across the Employment and Labour Courts by individual employees terminated by the Respondent in 2017. She further stated that this was not the first time as the Respondent had previously terminated its employees in a similar manner pending a looming sale to Puma Energy in 2012. That despite the Court issuing orders stopping the said unfair terminations in the company at the time, the Respondent proceeded with its action and led to the Court finding and holding the Group CEO Mr. David Ohana in contempt of court (See Vincent Edward Njoroge & 2 others v Kenol Kobil Ltd [2014] eKLR). It was the Claimant's submission that the Respondent is a serial infringer of employee's rights and that this Honourable Court ought to take cognizance of that fact.



12. On the prayers sought, the Claimant submitted urged this Court to consider the Hellen Wambui v Kenol-Kobil Ltd case (supra) wherein the Court in awarding the maximum compensation, considered as follows:
- a. The wishes of the employee and in this case, the Claimant wishes to be reinstated to her previous job though the Court deems it inappropriate to order reinstatement, in view of the ruse used by the Respondent to get rid of her.
  - b. The Court has considered and found that the Claimant's employment was terminated for no fault of her own at all but was victimized for operational reasons.
  - c. That the Claimant had offered the Respondent an excellent service for twelve (12) years with no adverse record at all.
  - d. That the very good prospects of continued employment was cut-short in a very abrupt and unexpected manner.
  - e. That the Respondent avoided in a sly manner to pay meaningful terminal benefits to a very long serving, excellent employee."

For the present case, the Claimant requested this Court, in computing the said award for 12 months' compensation, to consider the ruse used by the Respondent in terminating the Claimant, the fact that it was not the fault of the Claimant, the longevity of service of the Claimant, and finally, that the Respondent is a repeat offender in creating jurisprudence for unfairly terminating its employees over the years. That she is also deserving of compensation for unfair and unlawful termination as there was no valid reason advanced for the said termination.

14. She further submitted that she is entitled to severance pay as a matter of right as the real reason for terminating her employment was that her role was being declared redundant and that the Court should also grant her prayer for issuance of a certificate of service. That she is also entitled to two month' salary in lieu of notice since she was never given notice prior to her unlawful termination and to unpaid leave days and 13 days worked, which the Respondent did not dispute and was ordinarily the custodian of his records. She also prayed for costs of the suit as costs follow the event.

### **Respondent's Submissions**

- 15 The Respondent submitted that terminating the Claimant's employment on the ground of poor performance is a reasonable course of action that any employer could take when addressing a case of poor performance. That this position was affirmed by Kiage JA in the case of Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR while discussing the test for ascertaining the justifiability of the disciplinary action taken by an employer. The Respondent submitted that the Claimant is not entitled to the orders sought and relied on the case of Robert Kithinji Kiugu v AAA Growers Limited [2019] eKLR wherein the Court held that an employee whose contract is fairly terminated is not entitled to any reliefs. It further submitted that it was unclear why the Claimant's claim for damages was predicated on section 12(3)(vi) of the Industrial Court Act when she had also prayed for an award for damages under section 49 of the *Employment Act*. That it had demonstrated by way of evidence that it terminated the Claimant's employment on the grounds of poor performance and that she was thus neither entitled to damages nor to the maximum compensation sought. It relied on the case of Silas Oticno Okuinu v Kenya Medical Research Institute [2022] eKLR wherein the Court found that a claim for compensatory damages could not be granted where a termination was not unfair or not unlawful.



16. In addition, the Respondent submitted that the Claimant's unsubstantiated claim that she was declared redundant was contradicted by the facts on record i.e. in the termination letter dated February 10, 2023 explicitly stated that the cause of the management's concern was the drastic deterioration of the Claimant's performance. That the Claimant was thus not entitled to severance pay as she was not declared redundant. In the opinion of the Respondent, the prayer for severance pay should be denied for being a manifest attempt by the Claimant to obtain unjust and disproportionate benefit from both limbs of unfair termination and redundancy. That such an outcome would be unconscionable and amount to an unjust enrichment on the part of the Claimant if awarded. It was the Respondent's submission that the Claimant's Certificate has always been available at the Respondent's offices for collection. That the issue of notice pay was not and had never been in contention because she was informed of her entitlement to two months' notice pay in the termination letter dated 10<sup>th</sup> February 2017, which was to be collected upon the tabulation of all her final dues. However, that since it would have been unnecessary for this Court to determine the issue of notice pay had the Claimant engaged the Respondent to try and amicably settle the claim as severally proposed by the Respondent, the Claimant should be denied any interest on the amount of notice pay allowed.
17. Further, that the Claimant is not entitled to the claims for unpaid leave days and issuance of her vehicle's Logbook as she had failed to prove her entitlement to the same and her pleadings contained no particulars of her alleged claims. That it is trite law that parties are bound by their pleadings and cannot depart from the same, as held by the Court of Appeal in Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR. Further, the Court in the case of Okumu Aziz Ramadhan v China Roads and Bridge Corporation (Kenya) [2021] eKLR declined the claim for leave after finding that the claimant had not led evidence on his leave entitlement under the contract of service with the respondent. It was the Respondent's submission that in the absence of sufficient particulars in the Claimant's pleadings and her failure to lead evidence in support of the claim, the claim for unpaid leave days must fail. In addition, there was no evidence before this Court of the Claimant having any legal or beneficial interest in the subject motor vehicle, which according to her evidence before this Court was registered in the Respondent's name. That her prayers in relation to the said motor vehicle must also fail.
18. In submitting that the Claimant is not entitled to the claim for 13 days worked allegedly worked in February 2017 for being time barred, the Respondent cited the case of Attorney General & another v Andrew Maina Githinii [2016] eKLR in which the Court of Appeal held that the cause of action in a claim arising from the termination of employment accrues on the date of termination as communicated to the employee. That in the present case, the Claimant only introduced the said claim as an afterthought vide the Amended Memorandum of Claim filed in February 2022, which was over four-and-a-half years since the claim was instituted and approximately five years since the date when the cause of action arose on February 10, 2017. It further relied on the holding in John Kiiru Njiri v University of Nairobi [2021] eKLR wherein the Court stated inter alia that the limitation period is never extended in matters that are based on an employment contract. The Court implored the Court to uphold the law and find that the claim for 13 days' salary alleged to be due in February 2017 is time-barred under section 90 of the *Employment Act* and cannot be granted. The Respondent finally submitted that the costs of this suit should be awarded to it as it had proved that the termination of the Claimant's employment contract on grounds of poor performance was lawful and justified. That in any event, the Claimant failed to serve it with a demand letter and could not therefore be entitled to costs of the suit.
19. There are cases where an employer terminates the services of an employee and then embarks on a journey to determine reasons for doing so. Under the *Employment Act*, prior to dismissal of an



employee, there ought to be good reason. The Claimant had been appraised in June 2016 and was rated “very good”. It was the Respondent’s position in the suit before the Court that her performance deteriorated rapidly allowing for dismissal on account of poor performance. The Respondent did not produce any evidence of poor performance and no evidence was led on the Claimant being placed on performance improvement programme. It was a classic case of dismiss first and look for a reason later. The reason given by the Respondent for the termination is captured in the letter of termination dated February 10, 2017. It states in material part as follows – Further to the assessment of your performance Management have noted with concern that your performance has deteriorated drastically which has led to the re-structure of your department with the recent appointment of an LPG Manager a role that was fully with you. The termination was effective February 13, 2017. In December 2016 and to be precise, on December 8, 2016, the Respondent wrote to the Claimant indicating that it was very pleased with her performance and paid her a bonus of Kshs. 500,000/- in appreciation for the immense support she gave to the department. The letter went on to state that it was hoped she would continue with her good performance and co-operation in her assigned roles. This is contrary to the assertions on the letter of termination which was issued a mere 2 months after the December letter conveying her bonus payment. The pleadings for the Respondent and the assertions made in the defence of the suit do not accord with the facts surrounding the Claimant’s dismissal. In the court’s view, the dismissal was both unfair and unlawful as there was no basis for it.

20. The Claimant is not entitled to claim the salary for the days worked in February 2017. She ought to have claimed the sum but did not do so until her claim was amended in March 2022. As such, she had acquiesced to the non-payment and could not mount a claim on unpaid salary so late in the day. The claim had been caught up in time as she had a window to seek payment which window had long lapsed if you apply the provisions of section 90 of the *Employment Act*. Having only succeeded in showing her dismissal was unfair and unlawful for not following the dictates of the law, the Claimant is entitled to the following reliefs:-
- i. Two month’s salary in lieu of notice – Kshs. 1,400,000/-.
  - ii. Severance pay for the 25 years worked at the rate of 15 days’ pay – Kshs. 350,000 x 25 years = Kshs. 8,750,000/-.
  - iii. 6 months’ salary as compensation for unfair termination – Kshs. 4,200,000/-.
  - iv. Certificate of service in terms of section 51 of the *Employment Act*.
  - v. Interest at court rates on the sums in i), ii) and iii) from the date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nairobi this 3<sup>rd</sup> day of July 2023**

**Nzioki wa Makau**

**JUDGE**

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